No. 12,594

IN THE

United States Court of Appeals

For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Intervenors-Appellants' Opening Brief

Appeal from the United States District Court
District of Arizona

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Hon. CLAUDE McCOLLOCH of Oregon Presiding

Upon suggestion of Defendants-Appellants we have accepted their styling of the parties to this appeal.

There is but one transcript; figures in parentheses used herein refer to transcript pages; all emphasis used in the Brief, unless otherwise shown, is by the writer.

I.

JURISDICTIONAL STATEMENTS

In view of the fact that this appeal on the part of both appellants is primarily based upon the jurisdiction of the trial court, these factors are critical.

Appellate Court.

The jurisdiction of this court is based on Sections 1291 and 1294 (1), United States Code, Ann., and Rules 50, and 72 to 76, inclusive, of the Rules of Civil Procedure of the District Courts.

District Court.

The apparent jurisdiction in the District Court was based upon diversity of citizenship of the original parties; and an amount involved in excess of Three Thousand Dollars.

The defendants-appellants were residents of New York. The appellee-plaintiff was a resident of Arizona, county of Pima. The intervenor-defendant, Tucson Gas, Electric Light & Power Company, is a public utility, authorized and qualified to do business in Arizona; and The Industrial Commission of Arizona is a public agency created under the Constitution and Laws of Arizona to administer the Arizona State Compensation Fund and the Arizona Workmen's Compensation and Occupational Disability Laws. It has powers to sue and be sued in its own name.

The plaintiff, John E. Hubbell, an employee of Tucson Gas, Electric Light & Power Company, filed a case in the Superior Court of the State of Arizona, in and for the County of Pima (T.R. 6), served complaint and summons upon the defendants-appellants (T.R. 17, 19). The com-

plaint disclosed diversity of citizenship of the original parties, and the amount prayed for was in excess of $3,000.00. Defendants-appellants filed a petition for removal to the United States District Court for the District of Arizona, Tucson Division (T.R. 2, 5), together with jurisdictional bond (T.R. 20, 23), Notice thereof (T.R. 23, 24), and acknowledgment of service (T.R. 24, 25), and motion to dismiss for lack of jurisdiction on several grounds (T.R. 25, 26).

Thereafter intervenors-appellants filed a motion for leave to intervene (T.R. 27), together with a verified answer (T.R. 27, 35), and with Exhibit B (T.R. 35, 48) a motion to dismiss and a motion for summary judgment (T.R. 48, 51); and it was stipulated that the answer and motion for summary judgment would be deemed to be duly verified for all purposes (T.R. 54), and which challenged the jurisdiction of the court on several grounds (T.R. 6, 12, 25, with Exhibit 13, T.R. 16).

The motion for leave to intervene, pursuant to stipulation of the parties, was allowed (T.R. 51, 52; item 10,192).

Defendants-appellants joined in the intervenors-appellants' motion for summary judgment (T.R. 55).

The court denied the motions to dismiss, and for summary judgment (T.R. 55, 56, 149).

After the jury was empanelled and sworn, plaintiff offered to stipulate that The Industrial Commission of Arizona had a lien on any judgment for the plaintiff in the amount of $1,659.19, and counsel was directed by the Court that he might file a written stipulation (T.R. 66) which was subsequently filed (T.R. 64, 65, 161).

Plaintiff also moved (T.R. 66) to strike paragraph 1 of the prayer of the complaint (T.R. 9, 12), which was ob-

jected to by intervenors-appellants (T.R. 66). The motion was granted (T.R. 160, 161). The prayer asked that the award as an election of remedies be set aside.

The case was tried before a jury—the court removing from the jury three questions:—

1. The legal effect of a written contract between Tucson Gas, Electric Light & Power Company and defendants-appellants as to whether the written contract constituted an independent contract;

2. The legal effect of the filing of a claim for compensation by the plaintiff, and the acceptance and retention of, compensation benefits, as an election of remedies under the Arizona Workmen's Compensation Law (T.R. 149,155); and

3. The legal effect of failure to appeal the award to the Supreme Court.

The jury assessed damages in the amount of $50,000.00 against defendants-appellants; and the court, in the judgment, impressed a lien in favor of The Industrial Commission of Arizona in the amount of $1,659.19 (T.R. 80, 81).

Intervenors-appellants moved for an instructed verdict at the close of plaintiff's case (T.R. 68), and renewed the same at the close of all the evidence (T.R. 70, 144, 148) and after verdict, filed a motion to set the verdict aside, and for judgment notwithstanding the verdict, under Rule 5, Rules of Civil Procedure of the District Courts (T.R. 82, 83, 193), which were denied (T.R. 163).

Intervenors-appellants, being satisfied that the determination of the legal effect of the contract and the election of remedies were questions of law rather than questions of fact for the jury, did not file a motion for new trial.

Notice of appeal and bond (T.R. 93) and points or specifications relied upon by intervenors-appellants were filed (T.R. 94, 96, 206, 208).

STATEMENT OF CASE

The complaint alleged John E. Hubbell was employed by Tucson Gas, Electric Light & Power Company, a corporation, as a line-man; that he sustained personal injuries when he came in contact with an uninsulated wire carrying 12,500 volts of electricity, which he alleged was due to the negligence of Sanderson & Porter, whom he alleged to be independent contractors for his employer; that plaintiff was not informed that the wires and bars on the power station upon which he was working had been activated. The evidence established negligence and the amount of the judgment under all the facts, if the court had jurisdiction to render the same, was not excessive.

The record conclusively shows that on June 17, 1949, appellee sustained an injury by accident arising out of and in the course of his employment. His employer, Tucson Gas, Electric Light & Power Company, filed an employer's first report on July 9, 1949, reporting the accident (plaintiff's Exhibit 10, T.R. 170, 171). The initial report of the attending physician (intervenors-defendants' Exhibit A-B) was filed on July 6, 1949 (T.R. 190).

The appellee, on the 6th day of July, 1949, filed a workman's claim for compensation for injury or occupational disease (Plaintiff's Exhibit 6, T.R. 164), which was received by the Industrial Commission on July 9, 1949. Appellee's claim was docketed by the Commission as Claim No. A.E. 1063 (T.R. 164), and pursuant to Rule 28, Rules of Procedure before The Industrial Commission of Arizona adopted

pursuant to statute (T.R. 189)—in the absence of any showing in any of the three instruments that an "independent contractor" or third-party was involved—the Commission made findings and order accepting the claim as compensable, and awarding the applicant "accident benefits" (which represent medical and hospital care) and compensation benefits (T.R. 186), pursuant to which award compensation benefits were paid (T.R. 175) upon the original claim (T.R. 164) and supplemental claims (T.R. 165, 167, inc., and 177, 185, inc.), and until such time as the appellee failed to file supplemental claims pursuant to the Rules of the Commission; and until such time as the appellee filed an instrument entitled: "Election of Remedy in Matter Involving a Third Party Defendant", under Section 56-949, A.C.A. 1939 (T.R. 108, 110, 168, 169), following which a check already drawn was temporarily withheld pending the filing of a proper supplemental claim (T.R. 52, 53; 175).

In an instrument filed November 12, 1949, appellee purported to elect to sue the alleged third party for damages and to claim any deficiency in the amount recovered in any judgment and the amount he would be entitled to under the Arizona workmen's compensation law—despite the provisions of Sections 56-949, 56-950, A.C.A. 1939; and the Rules of the Commission adopted pursuant to statute relating to third party actions. (Intervenors' Exhibits A,A, Rules 70, 76, inc., and more particularly Rule 72, which reads: "The acceptance of compensation from the Commission or other insurance carrier shall be deemed to be an election to take compensation", which is a rescript of the last paragraph of Section 56-950, A.C.A. 1939). Appellee's justification, if any, is set out in T.R. pages 105 to 109.

The defendants-appellants, by their answer, admitted that appellee John E. Hubbell was an employee of Tucson Gas, Electric Light & Power Company, and was working in that capacity at the time he was injured. They denied that they were engaged as independent contractors, and alleged that the defendants-appellants were agents of, and were employed by Tucson Gas, Electric Light & Power Company, and subject to the right of supervision and control by said company. They denied negligence, and plead contributory negligence. Defendants-appellants also invoked the provisions of Section 56-946, A.C.A. 1939, which made the Workmen's Compensation Law the exclusive remedy of the appellee and the provisions of Section 56-949, A.C.A. 1939, which excludes any remedy other than the Workmen's Compensation Law as against a co-employee or fellow-workman; and further contended that even though a cause of action would lie against a fellow-workman, appellee had waived that remedy by claiming, accepting, and retaining compensation benefits under the Arizona Workmen's Compensation Law (Sections 56-949; 56-950, A.C.A. 1939); or in failing to have the award set aside by appeal to the Supreme Court of Arizona. The answer of intervenors-appellants presented substantially the same defenses.

EXPLANATORY STATEMENT

In view of the posture of the case at the time plaintiff rested, it did not appear to intervenors-appellants that a valid objection, based on legal error, would lie to the arbitrary and insulting conduct, and the rulings, of the trial judge, made at the threshold of the trial, as set out in pages 100, 102 of the Transcript of Record. And, we do

not, at this time, feel that they constitute reversible error as a basis for this appeal. Apparently, the court reconsidered its opinions (T.R. 149) in over-ruling plaintiffs' motion to dismiss intervenors.

We respectfully suggest, however, that such conduct does not command that degree of respect for members of the Federal judiciary which, in so far as we know, all members of the Arizona Bar accord to the judges of our courts.

The matter is referred to here for the reason that it reflects the prejudicial viewpoint of the court on the main issue under consideration before the court had heard any evidence whatsoever. We think the matter is material in evaluating the weight which this Court shall give to the opinion of the trial court in construing the legal effect of the written contract; and of the Election of Remedies—as to which we contend the court erred in its rulings on the legal effect thereof.

POINTS OF ERROR RELIED ON BY APPELLANTS THE INDUSTRIAL COMMISSION OF ARIZONA

Appellants, intervenors-defendants herein, submitted and filed Points or Specifications of Error (T.R. 94, 206) upon which they intend to rely on appeal in the Circuit Court of Appeals, for the Ninth Circuit, in the above entitled matter; and herewith present the same:

Point or Specification of Error No. I

The court erred in denying intervenors-defendants' motion for judgment notwithstanding the verdict, and entering final judgment for plaintiffs on the grounds that there is not an iota of competent evidence, or any inference that

a reasonable man might draw from the record as a whole, to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge, in effect holding that the defendants were in fact and in law "independent contractors."

Point No. II

The court erred in denying intervenors-defendants' motion for judgment notwithstanding the verdict and entering final judgment for plaintiffs, on the grounds that there is not an iota of competent evidence, or any inference that a reasonable man might draw from the record as a whole, to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge, that the provisions of the Workmen's Compensation Law were not the exclusive remedy of the plaintiff; and in effect holding that the plaintiff, and the respective defendants were not fellow employees of defendants-intervenors, Tucson Gas, Electric Light & Power Company.

Point No. III

The court erred in denying intervenors-defendants' motion for judgment notwithstanding the verdict, and entering final judgment for plaintiffs, on the grounds that there is not an iota of competent evidence, or any inference that a reasonable man might draw from the record as a whole to support the allegation of the complaint, or the implied findings of fact—independent of the jury—and legal conclusions of the trial judge—assuming that defendants were in fact and in law independent contractors—that plaintiff had not made a valid election of remedy under the Work-

men's Compensation Law; and that his cause of action, if any, by operation of law was not automatically assigned to the State for the benefit of the State Compensation Fund; and that the plaintiff was not estopped from prosecuting this action.

SUCCINCT STATEMENT OF QUESTIONS INVOLVED

The crux of the case, and of this appeal, is that both defendants-appellants and intervenors-appellants contend that John E. Hubbell and defendants Taylor, et al., were persons in the employ of, and subject to the right of supervision and control of the intervenor-appellant, Tucson Gas, Electric Light & Power Company; that all liability of the Power Company under the Arizona Workmen's Compensation Law for both parties was insured in the Arizona State Compensation Fund, administered by The Industrial Commission of Arizona; and that the exclusive remedy of the plaintiff for his injuries, under all of the pleadings, the evidence, and the law, was under the Arizona Workmen's Compensation Law; pursuant to the provisions of Section 56-946, A.C.A. 1939; and that, even though Sanderson & Porter were in truth, and in fact, independent contractors (which is expressly denied) any remedy appellee might originally have had against defendants-appellants became vested, as a matter of law in The Industrial Commission of Arizona, under the provisions of Sections 56-928, 56-929, 56-946, 56-949 and 56-950, A.C.A. 1939. And that, appellee having filed a claim for, and having been awarded, and accepted, and retained, medical, hospital, and compensation benefits under the Arizona Workmen's Compensation Law, appellee—in the absence of over-reaching, or fraud, which

was neither alleged nor proven—could not rescind his election of remedy to take compensation benefits. And that the only court having jurisdiction to vacate the award was the Supreme Court of Arizona (Section 56-972, A.C.A. 1939). On these issues which the court did not submit to the jury, but ruled on as propositions of law, we contend the court is clearly in error as a matter of law.

These issues were repeatedly and properly tendered on motion for summary judgment before trial; and on motions for an instructed verdict at the close of plaintiffs' evidence; after all of the evidence; and on motions to set aside the verdict.

The issue presented therefore is that the court was without jurisdiction in the premises and the judgment is void.

ARGUMENT

Points Nos. I and II

The law is well settled in Arizona that the status of employer and employee is regulated by statute and that no contract made within or without the state of Arizona can alter such status.

Ocean Accident & Guaranty Corp. v. Industrial Commission, 32 Ariz. 275, 257 Pac. 644, cited with approval

Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 87 L.Ed. 782, 63 Sup. Ct. 602, at 605 (footnote);

Industrial Commission v. Navajo County, 64 Ariz. 172, 167 P.(2d) 113.

Section 56-928, A.C.A. 1939, in so far as applicable, defines an employer as follows:

" * * *

(a) * * * every person who has in his employ three (3) or more workmen or operatives regularly employed in the same business or establishment, under contract of hire * * *

(b) When an employer procures work to be done for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, then such contractors and the persons employed by him, and his sub-contractor, and persons employed by the sub-contractor, are within the meaning of this section, employees of the original employer.

(c) A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work, not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job, or piece of work, and subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section.

* * * "

Section 56-929, A.C.A. 1939, in so far as applicable, provides as follows:

" * * *

(a) In this article, unless the context otherwise requires, the terms 'employee,' 'workman,' and 'operative' mean * * * every person in the service of any employer subject to the provisions of this article, including aliens and minors legally or illegally permitted to work for hire, but not including a person whose employment is casual and is not in the usual course of trade, business or occupation of the employer."

Under the provisions of Section 56-932, A.C.A. 1939 it is the mandatory duty of the employer to insure all employees in his service before putting them to work.

Under the provisions of Sections 56-944 and 56-945, A. C.A. 1939, an employer who provides insurance as provided by Section 56-932, supra, and posts notices giving notice to his employees that such insurance has been provided, under Section 56-944, supra, and that the employee is given the right to reject such insurance and the provisions of the compensation law, upon written forms to be maintained by the employer, and filing the same with the employer, who must file a copy thereof with The Industrial Commission of Arizona. If the employee fails to reject the provisions of the compensation law and the insurance, in writing, in the manner provided by Section 56-944, supra, the compensation law becomes his exclusive remedy against the employer—unless the employer shall wilfully and intentionally injure the employee, or has failed to post notices of compliance under the provisions of the Act, and kept forms available for the rejection of the Act, under the provisions of Section 56-946, A.C.A. 1939; and with the further exceptions:

> "Section 56-949. * * * If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another *not in the same employ,* such employee, or in the case of his death, his dependents, shall elect whether to take compensation under this title or pursue his remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise

of any such cause of action by the employee or his dependents at any amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same. * * *"

Section 56-950, A.C.A. 1939, provides:

"Election of remedy; waiver. Every employee, or his legal representative in case death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives any right to exercise any option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises any option to institute proceedings in court waives any right to any award or direct payment of compensation from his employer."

Under the provisions of Section 56-921, A.C.A. 1939 the Commission is given power to insure the entire underlying liability of the employer, not only for compensation claims, but for all liability claims whatsoever by employees, or their dependents, including the defense of an action. If a policy is issued it includes the duty to insure a contractor or an agent, as defined by Section 56-928 (b), supra.

West Chandler Farms Co. v. Industrial Commission, 64 Ariz. 383, 173 P.(2d) 84

and also includes the power to contract to insure a person whose status might be determined to be that of an independent contractor or an agent.

Burke, et al. v. Industrial Comm. of Utah, 75 Utah 441, 286 Pac. 623;

L. B. Price Mercantile Co. v. Industrial Commission, 43 Ariz. 257, 30 P.(2d) 491;

U. S. Fidelity & Guaranty Co. v. Industrial Commission, 42 Ariz. 422, 26 P.(2d) 1012;

West Chandler Farms Co. v. Industrial Commission, (supra).

The reasonableness and necessity for this power is clearly indicated by:

Arizona Binghampton Copper Co. v. Dixon, 62 Ariz. 163, 195 Pac. 538, 44 A.L.R. 881, Ann. 891, 904;

S. H. Kress & Co. v. Industrial Commission, 38 Ariz. 330, 299 Pac. 1034;

Scott v. Prescott Sanitary Laundry Co., 46 Ariz. 138, 47 P.(2d) 440;

West Chandler Farms Co. v. Industrial Commission, (supra).

The Industrial Commission, by its rules promulgated pursuant to Sections 56-920, 56-921, 56-922, A.C.A. 1939, issues a standard form of policy of insurance in the State Compensation Fund which provides, in part:

"14. It is understood by the applicant, subject to agreement by The Industrial Commission of Arizona, by the issuance of its policy, that the legal status of persons now employed, or who subsequently enter the employ of the applicant, may be uncertain. The applicant agrees, as an inducement to The Industrial Commission of Arizona, for the issuance of this policy, and as a partial consideration to avoid a *twenty-five 25% acceleration in rates—which The Industrial Commission has determined would be necessary if frequent inspections and audits are required to service the said*

policy—that when the applicant procures work to be done for him by a contractor, where the intent and purpose of the applicant and the contractor, is to constitute the latter an independent contractor, that before putting such purported independent contractor, or his, or its employees, to work, the applicant will notify The Industrial Commission of Arizona by telephone, or telegraph, and confirm the same in writing; and as a further inducement, the applicant agrees that if he shall fail to so notify the Commission of such persons who are engaged to perform work which is a part or process in the trade or business of the applicant, then such persons shall be deemed to be employees of the applicant, and insured hereunder, and the applicant agrees to pay the required premium to insure such persons. If this section is not agreed to, so specify, in which event the black face provision shall apply .....

.....

The following is a complete list of all persons, contractors and lessees, and/or subcontractors of said persons, contractors and lessees doing or engaged in the performance of work which is a part or process in the trade or business conducted by the employer whose names do not or will not appear as employees on regular payroll records:

.....

Name and Type of Work	Independent Contractor 'Yes' or 'No'	Do you Desire Coverage 'Yes' or 'No'

.....

.....

....."

(See T. R. 146)

The written contract, and supplements thereto, entered into between Tucson Gas, Electric Light & Power Co. and Sanderson & Porter did not abridge any statute. It was a contract they had a right to enter into (Exhibit B, T.R. 35, 48, inc.).

There is no allegation in the complaint that the contract was made to defraud the appellee, or anyone else; nor was there any evidence to support such a premise. Such allegations are jurisdictional.

Brazee v. Morris, 65 Ariz. 291, 179 P.2d 442; 68 Ariz. 224, 204 P.2d 475.

All parties affected by the contract construed it, at all times, as a contract of agency under which Sanderson & Porter were under the right of supervision and control of the Power company for all purposes. See testimony of appellees' witness Lovell (T.R. 112, 119); and of defense witnesses J. R. Snider, president and general manager of the Power company (T.R. 127, 132), and John H. Saunders (T.R. 132, 136), R. E. Dunn (T.R. 134, 135), and of Herman Broockmann (T.R. 136, 141), except appellee after his discharge from the hospital (T.R. 105, 109).

There is no conflict in the evidence given by these men, or in the fair inferences to be drawn therefrom, or from the contract—which can support any inference—except that it was the intent of the parties that Sanderson & Porter were agents, or contractors, under the right of supervision and control of the Power company; and that the only tenable legal conclusion is that their status was regulated by the provisions of Section 56-928(b), supra.

We contend even if they were not independent contractors that the intervenor, having procured a policy of in-

surance under the Workmen's Compensation Law, and the defendants, not having rejected the same, they became "co-employees" with the appellee so as to bar them from suing one another, under the provisions of Section 56-949, A.C.A. 1939, under the principles of estoppel.

West Chandler Farms Co. v. Industrial Commission, 64 Ariz. 383, 173 P.2d 84.

The case of *S. H. Kress & Co. and Clarence L. Wise v. Superior Court of Maricopa County,* 66 Ariz. 67, 182 P.2d 931, involved a suit brought by a minor through his guardian ad litem against S. H. Kress and Company, and its assistant manager, Clarence L. Wise. The issues tendered were that Clarence L. Wise, as assistant manager for the Kress company, unlawfully employed and permitted a minor to perform services for the store and to operate an elevator, such employment being prohibited by the Constitution, and the child labor laws, of the State of Arizona. The jurisdiction of the Superior Court to entertain the suit was challenged on three grounds:

1. That the employee, even though he was a minor, was bound by the compensation law, having failed to elect to reject the same;

2. That he had personally, and through his maternal parent, applied for, been awarded, received and retained, benefits under the workmen's compensation law; and

3. That the compensation law was his exclusive remedy against the employer, and also against Clarence L. Wise, his co-employee.

The Superior Court of Maricopa County assumed jurisdiction—despite these facts—in an action in damages against both the Kress company and Wise. An alternative writ of prohibition was obtained and, after hearing, and argument, was made pre-emptory. The court held that despite the fact that the employee was unlawfully permitted to work, in violation of the Constitution, and the child labor laws, he was emancipated under the provisions of Section 56-929, supra, for the purposes of his "regulated status" under the workmen's compensation law; and his failure to reject the same before injury constituted the workmen's compensation law his exclusive remedy.

The case is apposite on every factor here presented except that Wise was a "co-employee" instead of an alleged "independent contractor."

There are probably no two words in our language which are more confusing that the phrase "independent contractor." This fact was clearly recognized by the late Justice Cardozo when he was a member of the Circuit Court of Appeals of the State of New York, in *Gliemi v. Netherlands Dairy Company,* 171 N.E. 907, wherein he referred to the phrase, as used in *Singer Sewing Machine Co. v. Rahn* (1889), 132 U.S. 510; 10 Sup. Ct. 175; 33 L.Ed. 440; as "mystifying words."

It is noted that this phrase which has led to a confusion of tongues has been severely criticized. See *American Bar Association Journal, Vol. 34, No. II,* pages 126, 127, for February, 1948, and the cases therein discussed.

In *Workmen's Compensation Text, Schneider, Vol. 4,* Permanent Edition, page 10, it is suggested:

> "Has not the confusion of tongues in the decisions under workmen's compensation statutes arisen be-

cause the courts have failed to appreciate that independent contractorship does not extend to continuous work normally a part of the employer's business, but only to a definite job usually performed by one who has his own business for such work, and who could not be discharged without incurring liability before the work was finished."

The question of the "degree of control" where professional men, or skilled mechanics, are concerned is frequently more technical than real and the courts have so recognized that fact. *Industrial Commission v. Navajo County,* supra; and *Ex Parte Terry,* 211 Ala. 418; 100 Southern 768, wherein it was said:

"Undesirable, indifferent, and of little value, indeed, are the services of an employee who must be expressly directed as to the time, manner, and extent of doing each particular task."

The above citation has been quoted with approval in *State ex rel Duluth Brewing Co. v. District Court,* 129 Minn. 176; 151 N.W. 912, and in *Pittsburgh Plate Glass Co. v. Morris* (Okla.) 62 Pac.(2) 645.

Likewise, the test of the right of quitting employment without penalty is of doubtful weight, as was said by the Supreme Court of California, in *Drillon v. Industrial Accident Commission,* 17 Cal.(2) 346, 110 P.2d 64, at 69; wherein the court said:

"It would not be doubted that in many instances a servant would suffer penalties for refusing to perform his contract of employment in addition to his liability to his master for damages. An airplane pilot, regularly employed to operate a passenger plane, would certainly be subject to dire penalties if he should de-

cide to quit, don his parachute, jump, and abandon the shipful of passengers in mid-air; nevertheless, he is unquestionably *not an independent contractor.*"

The agency contract did not contain any penalty if Sanderson & Porter quit the job.

Stripped of its habiliments, with which it has been clothed n the literature of the law, the phrase "independent contractor" is a device apparently originated by the courts,

Singer Sewing Machine Co. v. Rahn, (supra)

and adopted by the legislatures to re-instate, in part, as defenses, the common law doctrines of the assumption of risk and fellow-servant which were abrogated, or devitalized, by the force of public opinion, constitutional provisions (Article XVIII, 3, 4, and 5, Constitution of Arizona), and by statute (Articles 9 and 12, Chapter 56, A.C.A. 1939).

Arizona Hercules Copper Co. v. Crenshaw, 21 Ariz. 15, 184 Pac. 996.

The Supreme Court of Arizona has recognized the apparent conflicts—even in its own decisions. In *West Chandler Farms Co. v. Industrial Commission,* 64 Ariz. 383; 173 P.2d 34; in construing the term "independent contractor" the court said:

"The court has had occasion to consider the above provision in determining whether a contractor was an employer or an employee. *There would appear to be considerable conflict in the decisions.* We think, however, that the statements of the court in Grabe v. Industrial Comm., supra, and in Alexander v. Alexander, 51 Ariz. 269; 76 P.2d 223, are determinative of the situation here. In the former case it was said (38 Ariz. 322; 299 Pac. 1034):

'Under section 1418 supra (56-928, A.C.A. 1939) if A procures B to do certain work for him which is a part or process in A's trade or business, and retains supervision or control over the work, then B and all B's employees and subcontractors to the nth degree are, for the purposes of the Compensation Act, employees of A, no matter what the terms or method of employment or compensation. It is obvious that were this not so the beneficent purposes of the act could and would be easily defeated or evaded by unscrupulous employers through the aid of various dummy intermediaries. The statute therefore brushes aside all forms and subterfuges and provides that one just, simple, and definite test. If the work be part of the regular business of the alleged employer, does he retain supervision or control thereof? All other matters are of importance only as they throw light on this question'."

In *Blasdell v. Industrial Commission,* 65 Ariz. 373; 181 P.2d 620, the court said:

"The body of law concerned with distinguishing independent contractors from employees is, indeed, huge. And though no hard and fast rule can be set forth, but instead each case must be determined by the sum total of its own facts, the general test laid down by our statute (Sec. 56-928) and by the great weight of authority is whether the alleged employer 'retains supervision or control over the method of reaching a certain result, or whether his control is limited to the result reached, leaving the method to the other party.' United States Fidelity & Guaranty Co. v. Industrial Commission, 42 Ariz. 422; 26 P.2d 1012, 1015. In order to apply this test and so determine the extent of this 'right of control,' courts look for a variety of sign-

posts or indicia none of which are in themselves conclusive but which when taken together and applied to a particular set of facts, aid in making the line to be drawn more clear. Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130; 65 P.2d 35; Consolidated Motors v. Ketcham, 49 Ariz. 295; 66 P.2d 246; Industrial Commission v. Meddock, 65 Ariz. 324; 180 P.2d 580."

We respectfully contend that the intent of the compensation law is to include and not exclude persons in the service of an employer; that the standard policy of insurance, an excerpt from which was heretofore quoted (Item 14 of the Application for Policy) establishes the construction placed thereon by the Industrial Commission; that the parties by their agency contract intended that their relationship was not to be that of an owner-independent contractor, but of principal and agent. That their procedure under the operation of the contract was the relationship of employer and employee; that there is not an iota of evidence to the contrary; and that all the evidence does not warrant an inference, either in fact, or in law, to sustain the legal conclusion apparently reached by the trial court.

The fact that the officers of the Power company did not give orders directly to workmen employed on the construction project affords no reasonable inference that they did not have the right to do so. The uncontradicted evidence is that the Power company had such right and exercised it (T.R. 141). Their wisdom in refraining from giving direct orders to workmen—aside from the union rules (T.R. 141) is dramatically sustained by the accident in this case. Where dangerous instrumentalities are in operation supervision must be in a direct line with no divided or dual authority (Testimony of Granville Gibson, T.R. 110, 112).

Argument

Point No. III

Page 149 of the Transcript of Record contains these rulings of the court:

> "Mr. Morris Udall: I would like to make a motion, there having been no showing the Industrial Commission of Arizona and Tucson Gas, Electric Light & Power Company are proper parties in this case; the proof having shown there was no election, there was no award, we ask the Court to dismiss as to those parties. We so move at this time.
>
> "The Court: * * *
>
> I have plaintiff's motion directed against Mr. McCluskey's client and that motion is denied.
>
> * * * * * * *."

We are in doubt, as apparently are the other parties to the case, as to the effect of this ruling:

(a) whether the court merely held that we were proper parties; or (b) whether it also held that there was no valid election of remedy.

If the court intended to hold that we were proper parties and that there was a valid election of remedy, then there would be no foundation for the judgment. The fact that the court immediately submitted the matter to the jury leaves only one conclusion, i.e., that the ruling was only to the effect that intervenors-defendants were proper parties; this interpretation is confirmed by the fact that motion for judgment notwithstanding the verdict was denied.

We think it is elementary that this case must be controlled by the Arizona statute.

The applicable sections are Sections 56-946, 56-949, 56-950, the last sentence of Section 56-967, and Section 56-972, A.C.A. 1939.

Under the Arizona Workmen's Compensation Law it is provided:

> "* * * no application shall be valid or claim thereunder enforceable unless filed within one (1) year after the date upon which the injury occurred or the right thereto accrued." (Section 56-967, A.C.A. 1939)

The appellee, therefore, had a full year from the date of injury to determine which remedy, if any, he desired to invoke. No one could compel him to act before he was ready, or before he could consult counsel.

In his complaint the appellee alleged that:

> "* * * on or about July 6, 1949, without any request by the plaintiffs, the Commission forwarded to said plaintiff, John E. Hubbell, application forms for compensation under said law; that while still hospitalized and without means to support his family, and acting without advice of counsel, the said John E. Hubbell filled out these forms and sent them to the said Commission * * *." (T.R. 11).

This allegation, or evidence offered in support of it, affords no valid grounds for recission.

The application forms were mailed to the appellee under the usual procedure of the Commission (T.R. 122).

Appellee's claim was dated July 6, 1949, and was filed with the Commission on July 9, 1949 (T.R. 164); the employer's report was dated June 22, 1949, and filed with the Commission on July 9, 1949 (T.R. 170); the physician's initial report dated June 23, 1949, and filed July 9, 1949

(T.R. 190). There is no reference in any of the three instruments that any third party was involved. Nor was there any reference to a third party in subsequent claims filed by appellee (T.R. 108, 109).

The Commission, under the provisions of the Statute, and rules made pursuant thereto, entered its findings and order awarding "accident benefits" and "compensation" to the applicant (T.R. 186). He received and retained the said benefits (T.R. 175).

The appellee never filed a proceeding in certiorari to set the award aside under Section 56-972, A.C.A. 1939, which is jurisdictional.

The first intimation that there might be a third party involved is contained in the evidence of plaintiffs' witness, H. S. McCluskey (T.R. 123, 124). Following the conference therein referred to under date of September 17, 1949, appellee declined to file any further supplemental claims for compensation benefits, and did file an instrument purporting to be an election of remedies (T.R. 168). Appellees' explanation is set out in Transcript of Record at pages 108, 109.

Following the filing of this instrument the Commission caused an investigation to be made, and reached the conclusion that the exclusive remedy of the appellee was under the workmen's compensation law, and upon request of appellee (T.R. 108) suspended further payments awaiting such time as appellee filed a valid monthly claim. Appellee testified: "I withdrew my claim of September 14, 1949, after my attorneys had advised me I could sue Sanderson & Porter" (T.R. 108).

The action of the Commission in the premises was further evidenced by the filing of the Motion for Leave to Intervene (T.R. 27) and by the Answer and Motion for Summary Judgment filed contemporaneously therewith (T.R. 26-51, inc.).

In connection with his claim for compensation plaintiff testified (T.R. 108, 109):

> "* * * At all times while drawing compensation I thought I had the right to sue Sanderson & Porter and also accept the compensation. With reference to Plaintiff's Exhibit No. 6, which is the original claim for compensation, I signed this blank but I did not fill it out. It was filled out by a member of the Tucson Gas Company and I do not know why there were blanks left after the questions, "Was accident caused by another person," and "If so, by whom."
>
> "I knew Sanderson & Porter were in the picture and I intended to prosecute an action against them and this is true as to the subsequent claims I signed and submitted to the Commission. I did not suspect I was not entitled to both until I consulted my lawyer."

Further testimony in this connection is set out in the Transcript of Record (at pages 106 to 109, inc.).

We emphasize that petitioner had a whole year after injury to determine what he wanted to do (Section 56-967, A.C.A. 1939, supra). Appellee was charged with the duty to know the law under which he claimed benefits. He had notice of facts which would put a man of ordinary prudence and intelligence on inquiry which is equivalent to knowledge of all the facts which a reasonably diligent inquiry would disclose, *Maricopa Utilities Co. v. Cline,* 60 Ariz. 209, 134 P.(2d) 156.

There is no allegation in the complaint that he was overreached; or that any fraud was practiced upon him; and there is no evidence thereof. The claim was handled in a routine manner under the procedure of the Industrial Commission of Arizona. We, therefore, contend that the sections of the statute heretofore quoted are conclusive on the matter of his election of remedies, if any there be.

These statutes have been construed and applied by the Supreme Court of Arizona in *S. H. Kress & Co. and Clarence L. Wise v. Superior Court of Maricopa County,* supra; *Moseley v. Lily Ice Cream Co.* (1931), 38 Ariz. 417; 300 Pac. 958; *Industrial Commission v. Nevelle* (1941), 58 Ariz. 325; 119 P.(2d) 934; *Weaver v. Martori* (1949), 69 Ariz. 45; 208 P.(2d) 652.

The case of *S. H. Kress & Co. and Clarence L. Wise,* supra, is most nearly in point. We have discussed this case under our Argument on the previous two points, and refer to and adopt it here.

In the first three cases compensation benefits had been claimed and had been paid. In the *Moseley* case the Court expressly held:

> "* * * Where an employee injured by a third person elects to take compensation, all his rights against the third person pass, as a matter of law, to the state for the benefit of the state compensation fund."

The Court analyzed the provisions of the statutes of the several states, and the many different provisions thereof, and further said:

> "* * * We are of the opinion, both on authority and on a logical interpretation of the language of the statute that, under its provisions, when payment under

the compensation act is chosen by the injured employee, his rights *of every nature* against the third person pass as a matter of law to the state or other insurer, and *no right of action, either direct or indirect, remains in him as against such third person.* * * *"

The Court expressly upheld the constitutionality of the law as against the contention of the plaintiff. The Court pointed out in the *Moseley* case—as happens to be the fact in the case at bar—that the plaintiff had made no effort to have his award set aside in the only manner in which it could lawfully be set aside, that is, under the provisions of Section 56-972, by review by the Supreme Court.

It is pertinent that in the case at bar, in his pleadings, the appellee prayed that the Court set aside his election, but he subsequently abandoned the same and moved to strike that part of the prayer of his complaint (T.R. 161) which motion was granted (T.R. 161).

In the *Moseley* case the Court reserved jurisdiction as to whether, on a proper showing, an apparent election might have been set aside on the ground that it had not been raised by the pleadings. The amended complaint does not raise it here.

In the *Nevelle* case, supra, the Commission undertook to recover from the third party an amount in excess of what it had paid, or was obligated to pay, the injured person; and to pay any difference over such amount to the injured workman. The Court, in that case, did not have under direct consideration the right of recission. However, the effect thereof would be the same. The action of the Commission would enable the workman to collect the bene-

fits to which he was entitled under the compensation law, and have the Commission sue to recover for a larger amount from the third party, and pay any excess recovered to the injured workman.

The Court held that the Commission could only recover the amount it had paid, or is bound to pay in the future, as the result of an award made to the employee, together with its necessary costs in the premises. The injured man had no interest in the action.

The *Kress* case raised the right of recission after the receipt of benefits under the statute, upon the theory that the plaintiff was a minor unlawfully permitted to work, and forbidden to contract for such employment and therefore not bound by the Act. Clarence L. Wise was sued as a third party under the allegations of the petitioner even though he was a co-employee. The Court rejected all contentions and held that the exclusive remedy of the minor under the facts was under the compensation law and the Superior Court was without jurisdiction.

In the case of *Weaver v. Martori,* et al., (1949), 69 Ariz. 45; 208 P.(2d) 652, the case involved a minor who, through a guardian ad litem, first filed suit in the Superior Court of Maricopa County, which was removed to the U. S. District Court at Phoenix, and dismissed for lack of jurisdiction upon the allegations of the complaint that the minor was an employee of the defendant. The minor through a guardian ad litem subsequently filed a proceeding before the Industrial Commission of Arizona. The defense was that the proceedings before the Commission were barred by reason of the fact claimant had prosecuted the action in the Federal court to a conclusion; the Court denied the contention and said:

"* * * The Commission suggests that the filing of this suit constituted an election of remedies under Section 56-950, A.C.A. 1939, and that the minor, acting through petitioner, had no right to file the instant claim for compensation. *If we were dealing with the rights of an adult, or of minors who under Section 56-974, A.C.A. 1939 are deemed sui juris, this contention would be sound.* However such a claim cannot be sustained as to this minor because the power of the guardian ad litem then representing him are especially limited in the right of election as stated in 43 C.J.S., Infants, Sec. 111(a): 'Election for infant. Neither a guardian ad litem nor a next friend may make an election for an infant without the consent of the court; but it may be done with such consent'."

The Supreme Court of Arizona repeatedly has held that, n the absence of a clear showing of fraud or over-reaching, vhen an award is made, and payments thereunder are ac-epted without appeal, that it becomes res adjudicata with-n thirty days after it is rendered. Section 56-972, A.C.A. 939.

DiPaolo v. Calumet & Arizona Mining Co., 36 Ariz. 374, 285 Pac. 680;

Beutler v. Industrial Commission, 67 Ariz. 72, 190 P.(2d) 918.

And the Court held that the Commission under its rules nay not extend the time of appeal, or recover a lost jur-sdiction, by an attempt to waive its rules and re-open the ase.

Guy F. Atkinson, et al. v. Kinsey, et al., 61 Ariz. 127, 144 P.(2d) 547;

Lauderdale v. Industrial Commission, 60 Ariz. 443, 139 P.(2d) 449.

Attention is drawn to the fact that Section 56-950, supra, and Rule 72 of the Industrial Commission, which is, in part, a rescript thereof, provide:

> "Acceptance of compensation from the Commission, or other insurance carrier, shall be deemed to be an election to take compensation."

The statutory rule we contend is a *conclusive presumption.*

The statute and the rules of the Commission are in accord with the general rule on "Election of Remedies" in the State of Arizona.

Calvi v. Dowdy, 14 Ariz. 148, 125 Pac. 873;

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 Pac. 465;

Lee Moor Contr. Co. et al. v. Industrial Comm., 65 Ariz. 300, 179 P.(2d) 786;

Bradley v. Industrial Commission, et al., 51 Ariz. 291, 76 P.(2d) 745.

These general rules are not modified by the adoption in Arizona of the Rules of Federal Procedure:

Hartford Accident & Indem. Co. v. Industrial Comm., 66 Ariz. 259, 186 P.(2d) 959.

The general rule is thoroughly briefed in an annotation to *6 A.L.R. (2) 11-82,* and more particularly, pages 18 and 30 thereof, where the Arizona rule is discussed.

We are not unmindful of the cases of:

Miles v. Lavender (1926), 10 Fed.(2) 450;

Twohy Bros. Co. v. Rogers, 293 Fed. 566;

Johnsen v. American-Hawaiian S.S. Co. (1938), 98 Fed.(2) 847.

These cases were decided by this Court prior to the impact of the rule in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64; 82 L.Ed. 1188, and we deem them to be without application at this time; and for the further reason that they have no application under the particular statute under consideration.

We, furthermore, are not unmindful of

Richardson v. Commissioner of Internal Revenue,
126 Fed.(2) 562, 140 A.L.R. 705, at 713,

in which it was asserted that trial judges in Federal courts are:

> "* * * not compelled to play the role of ventriloquist's dummy to the courts of some particular state * * *"

We contend, however, that the trial judge is required to give effect to the Arizona law, as interpreted by the decisions of the Arizona Supreme Court. And, that there is no support under the facts, and the law, for attempted invalidation of an election of remedy made under the Arizona statute.

CONCLUSION

We contend, therefore, that the judgment of the trial court should be reversed upon the following grounds:—

(a) That Sanderson & Porter were not independent contractors;

(b) That Sanderson & Porter and appellee were, in truth and in fact, and in law, fellow employees and insured by a common employer under the Arizona Workmen's Compensation laws in the State Compensation Fund;

(c) That no cause of action will lie against a "fellow employee" for an injury by accident arising out of and in course of employment;

(d) That the exclusive remedy of the appellee was under the workmen's compensation law;

(e) That even if Sanderson & Porter were in truth and in fact an independent contractor, appellee had made a valid election of remedy; and his cause of action, if any, against the alleged independent contractor was assigned to the Industrial Commission by operation of law;

(f) That even if a cause of action would lie against a "fellow employee" appellee had made a valid election under the workmen's compensation law and his cause of action, if any, was assigned to the State by operation of law;

(g) That the grounds alleged in the complaint, or matters in evidence, are not sufficient to constitute any equitable grounds upon which the Court might set aside an otherwise valid election of remedies;

(h) That the Court was without jurisdiction to set aside the election of remedy even if good grounds existed therefor, for the reason that the plaintiff, by amendment of his complaint, expressly withdrew this issue from the trial (T.R. 161) *Moseley v. Lily Ice Cream Co.,* supra.

(i) That there is no evidence to support a finding of fact, or a conclusion of law, that the election of remedy was invalid;

(j) That if the award of the Commission was invalid it could only be set aside—after 20 days—by appeal to the Supreme Court of Arizona. And, after 30 days that court is without jurisdiction.

(k) If there were a valid election of remedies, and defendants-appellants were determined to be independent contractors the cause of action was automatically assigned to the Industrial Commission by operation of law, and the Federal Court was without jurisdiction in the premises.

It is the view of intervenors-appellants that the matter of interpreting the contract, and effect of the election, are conclusions of law for the court, and were not issues for the jury, and that no new trial is necessary in the premises.

Therefore, it is respectfully submitted the judgment should be reversed with cost to intervenors-appellants.

Respectfully submitted,

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